Team No. 18

No. 415-2017

In the

Supreme Court of the United States

April Term, 2017

DAVID R. TURNER,

Petitioner,

v.

ST. FRANCIS CHURCH OF TOUROVIA, THE TOUROVIA CONFERENCE OF CHRISTIAN CHURCHES, and REVEREND DR. ROBERTA JONES,

Respondents.

On Writ of Certiorari to the
Tourovia Court of Appeals

BRIEF FOR PETITIONER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES

UNITED STATES COURT OF APPEALS CASES

UNITED STATES DISTRICT COURT CASE

STATE COURT CASES

CONSTITUTIONAL PROVISION

FEDERAL STATUTES

TOUROVIA STATUTE

TOUROVIA RULE OF CIVIL PROCEDURE

QUESTIONS PRESENTED

1. Does the ministerial exception of the First Amendment bar a minister's beach of contact and retaliatory discharge claims under a state whistleblower statute where the church fired the minister nine months before the end of his employment contract in retaliation for his refusal to illegally administer a bequest on behalf of the church?

2. Does the First Amendment prohibit wrongful termination claims based upon breach of employment contract and retaliatory discharge brought by a minister from proceeding to discovery where the face of the complaint does not unambiguously establish that the ministerial exception has been satisfied?

JURISDICTIONAL STATEMENT

The Tourovia Supreme Court granted Respondents' motion to dismiss under Tourovia Rule of Civil Procedure 12(b)(6) on January 20, 2015. R. at 2. The Tourovia Court of Appeals affirmed on August 16, 2016. R. at 4–14. This Court granted a Writ of Certiorari to the Tourovia Court of Appeals. R. at 15. Therefore, this Court has jurisdiction under 28 U.S.C. § 1257(a).

OPINIONS BELOW

The opinion of the Tourovia Supreme Court is reported at *Turner v. St. Francis Church of Tourovia*, No. 13-C-041511 (Tour. Sup. Ct. Jan. 20, 2015) (indicated in the R. at 2). The opinion of the Appellate Division, Second Department of the Tourovia Supreme Court is reported at *Turner v. St. Francis Church of Tourovia*, No. 13-C-041511 (Tour. Sup. Ct. App. Div. Dec. 18, 2015) (indicated in the R. at 3). The opinion of the Tourovia Court of Appeals is reported at *Turner v. St. Francis Church of Tourovia*, No. 13-C-041511 (Tour. Aug. 16, 2016) (indicated in the R. at 4–14).

STATEMENT OF THE CASE

Petitioner David Turner appeals from an order of the Tourovia Court of Appeals affirming the dismissal of his wrongful termination claims as a result of a 12(b)(6) Motion to Dismiss.[1] R. at 4–14. Mr. Turner brought suit against Respondents St. Francis Church of Tourovia, the Tourovia Conference of Christian Churches ("CCC") and Reverend Dr. Roberta Jones (collectively "Respondents") alleging wrongful termination based on breach of contract and retaliatory discharge. R. at 4–5. Respondent St. Francis is administered by Respondent CCC, and Respondent Dr. Jones is the superintendent of CCC. R. at 4.

Respondents employed Mr. Turner as a pastor at St. Francis from July 1, 2009 until October 31, 2012 pursuant to a yearly employment contract. R. at 4–5. Each successive contract extended from July 1st to June 30th, with the most recent renewal occurring in June 2012. R. at 4. Throughout this time Respondents renewed Mr. Turner's contract on three prior occasions without complication. R. at 4.

On May 16, 2012, St. Francis was informed that it would soon receive a $1,500,000 bequest from the Edward Thomas Trust ("Trust"). R. at 5. St. Francis assigned Mr. Turner to administer the bequest based on his nearly twenty-five years of experience as a financial manager for IBM Corporation and thereafter as CFO and treasurer of a regional CCC office. R. at 5. Wells Fargo served as trustee of the Trust. R. at 5.

[1] Tourovia has adopted the Federal Rules of Civil Procedure in their entirety. R. 4 n.3.

The terms of the Trust required CCC to use one-half of the bequest for the general operation and maintenance of St. Francis and the other half for the general upkeep of St. Francis's cemetery. R. at 5. Shortly after beginning his role as administrator, Mr. Turner determined that: (1) St. Francis sold its cemetery in 2009 and no longer maintained a cemetery fund; and (2) it therefore would be a breach of trust—and possibly constitute fraud and tax evasion—to accept the portion of the Trust marked for the cemetery. R. at 5.

Mr. Turner took these observations and concerns to St. Francis's Board of Trustees and advised that it should notify Wells Fargo and request additional guidance. R. at 5. Instead, the Board's Vice Chairman instructed Mr. Turner to request the full amount of the bequest and deposit it in the church's general operating account. R. at 5. Because Mr. Turner believed this action would be unlawful, he refused and took his concerns to Dr. Jones in August 2012. R. at 5. On October 10, 2012, after it became clear that neither the CCC nor St. Francis had any intention of contacting Wells Fargo, Mr. Turner contacted Wells Fargo and the IRS to ask for guidance regarding the potential fraud and tax implications. R. at 5.

On October 16, 2012, less than a week after Mr. Turner contacted Wells Fargo and the IRS, Dr. Jones notified Mr. Turner that his pastorship was terminated effective October 31, 2012. R. at 5. Dr. Jones' purported reason for terminating Mr. Turner was that Respondents had had "lost faith" in Mr. Turner's spiritual leadership. R. at 4. Mr. Turner's employment contract would not have expired until June 30, 2013. R. at 4.

On September 12, 2013, Mr. Turner commenced this action in the Tourovia Supreme Court alleging that (1) Respondents breached Mr. Turner's employment contract; and (2) Respondents violated Section 740 of the Tourovia Labor Law by terminating Mr. Turner in retaliation for his report of, and refusal to participate in, Respondents' fraud and tax evasion with regards to the Trust. R. at 4–5. Mr. Turner requests only monetary damages on both counts. R. at 5.

On January 20, 2015, the trial court granted Respondents' Motion to Dismiss under Tourovia Rule of Civil Procedure 12(b)(6). R. 2. The Tourovia Court of Appeals affirmed the judgment of the trial court on August 16, 2016. R. at 4–14. Subsequently, this Court granted a Writ of Certiorari to the Tourovia Court of Appeals. R. at 15.

SUMMARY OF ARGUMENT

This Court should reverse and reinstate Mr. Turner's complaint because the Tourovia Court of Appeals improperly applied the ministerial exception without considering the specific type of claims set forth in the complaint and dismissed Mr. Turner's claims without an opportunity to perform discovery.

The ministerial exception does not preclude Mr. Turner's breach of contract claims because the parties voluntarily assumed the terms of Mr. Turner's employment contract, and the mere enforcement of those terms would create no constitutional violation. Respondents breached Mr. Turner's employment contract by terminating him nine months prior to the end of the contract's term. Respondents could have retained the right to fire Mr. Turner at any time through at-will employment, but instead voluntarily assumed the terms of an employment contract with Mr. Turner. Therefore, Respondents should not be permitted to hide behind the ministerial exception when they have freely bargained for a legal relationship governed by secular law.

The ministerial exception equally does not shield a party from the consequences of committing fraud, and therefore does not preclude Mr. Turner's retaliation claim based on Respondents' fraudulent conduct regarding illegally allocating the Trust. Respondents' actions amount to attempted fraud towards Wells Fargo and tax evasion towards the IRS. This type of outward action affects the public and falls within a secular court's power to regulate under *Employment Division v. Smith*, 494 U.S. 872 (1990) and *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012).

Finally, the ministerial exception does not apply to Section 740 of the Tourovia Labor Law because the statute survives the three-pronged test set forth by this Court in *Lemon v. Kurtzman*, designed to test whether a statute unconstitutionally interferes with religious institutions. 403 U.S. 602 (1971). This Court should, therefore, reverse the decision of the Tourovia Court of Appeals and hold that the ministerial exception does not bar Mr. Turner's wrongful termination claims.

Alternatively, this Court should follow the growing trend of lower courts that have recognized the ministerial exception does not preclude a minister's claim from proceeding to discovery unless the complaint unambiguously establishes that the resolution of that claim would require a court to violate church autonomy, either by deciding matters of church doctrine or intruding into church governance. Courts should be permitted to apply neutral principles of law to resolve a plaintiff's claim where the resolution of a minister's claim would not result in a court's excessive entanglement with religion. This approach fully comports with this Court's holding in *Hosanna-Tabor* and furthers the policies behind the First Amendment.

The face of Mr. Turner's complaint does not unambiguously indicate that the resolution of his claims would require a court to violate church autonomy. This Court should therefore remand for discovery and allow the parties to develop the factual record necessary to explore whether or not Mr. Turner's contract and retaliation claims should be dismissed under the ministerial exception. For these alternative reasons, this Court should reverse the Tourovia Court of Appeals and reinstate Mr. Turner's complaint so that discovery can be conducted.

ARGUMENT

I. THIS COURT SHOULD REVERSE THE TOUROVIA COURT OF APPEALS AND REINSTATE MR. TURNER'S COMPLAINT BECAUSE THE MINISTERIAL EXCEPTION DOES NOT APPLY TO HIS CLAIMS.

This Court should reverse the Tourovia Court of Appeals and reinstate Mr. Turner's claims because it erroneously applied the ministerial exception without considering the specific types of claims set forth in his complaint.

The ministerial exception only precludes ministers from bringing *discrimination* claims against a religious institution. *Hosanna-Tabor*, 565 U.S. at 188. Indeed, this Court explicitly distinguished discrimination claims from other employment-related claims and expressed "no view" on the exception's viability outside the discrimination context. *Id.* at 196. Despite this ruling, the Tourovia Court of Appeals erroneously held that the ministerial exception automatically barred *all* wrongful termination claims by Mr. Turner simply because Respondents are a "church" and Mr. Turner was a "minister." In so ruling, the lower court failed to acknowledge that "the [F]irst [A]mendment does not immunize the church from all temporal claims made against it." *Minker v. Balt. Annual Conference of United Methodist Church*, 894 F.2d 1354, 1360 (D.C. Cir. 1990).

Lower courts are divided on whether the ministerial exception applies to employment claims not based on discrimination, such as those for breach of contract and retaliation. *See, e.g.*, *Petruska v. Gannon Univ.*, 462 F.3d 294 (3d Cir. 2006); *Second Episcopal Dist. African Methodist Church v. Prioleau*, 49 A.3d 812 (D.C. 2012). *But see Bell v. Presbyterian Church*, 126 F.3d 328 (4th Cir. 1997). This Court should adopt the analysis of the courts that do not presumptively apply the

ministerial exception to all employment related claims, as this approach prevents religious organizations from abusing the ministerial exception as a means to avoid their secular obligations.

For example, in *Kirby v. Lexington Theological Seminary*, the Supreme Court of Kentucky determined that the plaintiff, a tenured faculty member, was a ministerial employee bringing suit against a religious institution, yet it conducted further analysis to decide whether the minister's contract claims could survive summary judgment. 426 S.W.3d 597, 614 (Ky. 2014). The Supreme Court of Kentucky highlighted that the Seminary voluntarily agreed to fire tenured faculty members only under certain conditions, and in doing so it "ced[ed] a degree of its constitutional rights." *Id.* at 617. Similarly, here, Respondents ceded some of their constitutional protections by voluntarily contracting with Mr. Turner for yearly employment. In support of his claim, the plaintiff in *Kirby* relied upon on the defendant's Faculty Handbook, which outlined the grounds for dismissal of a tenured faculty member. *Id.* at 603. In violation of these terms, the plaintiff and all the other tenured faculty were fired due to the Seminary's financial hardships. *Id.* The Tourovia Court of Appeals should have followed the approach of *Kirby* and considered the specific types of claims that Mr. Turner alleged before dismissing his complaint.

The analysis of the Tourovia Court of Appeals and other courts that have presumptively applied the ministerial exception, without looking at the particular claims asserted, wrongfully supports the establishment of religion in violation of the First Amendment. Pursuant to the Tourovia Court of Appeals' erroneous analysis, a

defendant need only prove that it is a religious organization and that the plaintiff is a minister to escape enforcement of "neutral and otherwise applicable tort or contract obligations." *Prince of Peace Lutheran Church v. Linklater*, 28 A.3d 1171, 1184 (Md. 2011). This creates a shield for religious institutions, guarding them from any and all secular laws, regardless of whether said laws actually hinder religious freedom. Such application is contrary to the intent of the ministerial exception and accordingly, this Court should reverse and reinstate Mr. Turner's claims.

A. This Court Should Reinstate Mr. Turner's Complaint Because the Ministerial Exception Does Not Apply to Breach of Contract Claims.

Consistent with this Court's holding in *Hosanna-Tabor*, the ministerial exception does not apply to breach of contract claims because a trial court's enforcement of Mr. Turner's employment contract with Respondents would only involve voluntary contractual obligations. It is well established that "[a] church is free to burden its activities voluntarily through contracts, and such contracts are fully enforceable in civil court." *Minker*, 894 F.2d at 135. Religious organizations' contract and property rights are protected under secular laws, subjecting the actions of members to the law's constraints. *Watson v. Jones*, 80 U.S. 679, 679 (1872). Civil courts may resolve contract disputes dealing with "the manner in which churches own property, hire employees, or purchase goods." *Id.*

Several lower courts have correctly held that the ministerial exception does not apply to breach of contract claims. For example, the North Carolina Court of Appeals denied a motion to dismiss a minister's claim alleging that a church failed to pay him compensation and benefits pursuant to a written employment contract. *Bigelow v.*

Sassafras Grove Baptist Church, 786 S.E.2d 358, 365 (N.C. Ct. App. 2016). Likewise, the New Mexico Court of Appeals permitted a minister's breach of contract claim to proceed where her church-employer made express and implied promises regarding her employment, and where the minister reasonably relied upon these promises in accepting employment. *Galetti v. Reeve*, 331 P.3d 997, 1002 (N.M. Ct. App. 2014). The Kentucky Court of Appeals also recognized that breach of contract claims are "within the jurisdiction of the courts to adjudicate" when it considered a minister's claim for accrued wages and benefits. *Crymes v. Grace Hope Presbyterian Church, Inc.*, No. 2011-CA-000746-MR, 2012 Ky. App. Unpub. LEXIS 564, at *4 (Ky. Ct. App. Aug. 10, 2012).

The foregoing cases demonstrate that within the last several years, courts across the country have inquired into the specific type of claim involved, rather than automatically applying the ministerial exception. These courts allowed breach of contract claims and claims for lost wages, notwithstanding the ministerial exception, because they fell outside the domain of church autonomy. This Court should follow these decisions and hold that a religious institution's contractual obligations are reviewable by a secular court. Respondents had the choice to hire Mr. Turner as an at-will employee without voluntarily entering into a contractual agreement. If they had done so, Respondents would have reserved the right to fire him at any time for any reason. However, because Respondents did not make that choice, and instead freely bargained for contractual terms, contract law should apply.

Courts that apply the ministerial exception do so in instances, unlike here, where the church-employer in effect retained the right to terminate the employment at-will. For example, the Wisconsin Supreme Court found that it could not adjudicate a breach of contract claim involving a minister's employment contract with a religious institution where the terms allowed the defendant employer to fire the plaintiff for good cause, but good cause was to be determined by the employer. *DeBruin v. St. Patrick Congregation*, 816 N.W.2d 878, 890 (Wis. 2012). The concurrence reasoned that there could be no breach of contract claim when no contract existed; the agreement was based on an illusory promise because the plaintiff could be fired for good cause, but the employer reserved the right to determine when good cause existed, making the plaintiff an at-will employee. *Id.* at 891 (Crooks, J., concurring).

Similarly, this Court in *Serbian E. Orthodox Diocese v. Milivojevich* applied the ministerial exception to a breach of contract claim where the Holy Synod and the Holy Assembly of a church had the sole exclusive power to remove, suspend, defrock, or appoint Diocesan Bishops. 426 U.S. 696, 698 (1976). That is, no contractual terms determined the basis for firing ministerial employees and the church retained the absolute right to terminate them. *Id.*

It is evident that courts that have applied the ministerial exception to alleged breach of contract claims did so when the underlying employment arrangement was not actually contractual or where the church retained discretion in their decision to terminate. In this case, Respondents have not challenged the validity or existence of Mr. Turner's employment contract and the record does not indicate that Respondents

could terminate Mr. Turner for good cause. Furthermore, there is no evidence to suggest that "lost faith" in a minister was good cause to fire him. While Mr. Turner contends that the reason given for his termination is pretextual, even if Respondents fired Mr. Turner because they truly "lost faith" in his spiritual leadership that would still be a breach of contract.

Respondents illegally fired Mr. Turner because he refused to illegally administer the Trust. This constitutes a breach of contract because Mr. Turner's contract did not include his role as administrator of the bequest. Mr. Turner's original contract was effective July 1, 2009 and was renewed for the third time in June 2012. R. at 4. As a result, his contractual duties could not have encompassed his role as administrator of the Trust because Wells Fargo Bank did not inform Respondents of the bequest until May 16, 2012. R. at 5. Only thereafter did the congregation choose Mr. Turner to administer the Trust due to his extensive financial experience. R. at 5. Even if his employment contract covered his duties as administrator of the Trust, Mr. Turner's refusal to illegally administer the Trust was rooted in an unwillingness to breach secular laws; the record does not indicate that there was anything in the contract that obligated him to look the other way as Respondents attempted to circumvent the terms of the Trust and their obligations to Wells Fargo Bank and the IRS.

These facts, accepted as true, establish a valid breach of contract claim that is justiciable by a trial court and is not subject to the ministerial exception.[2] Therefore, unlike *DeBruin* and *Milivojevich*, the ministerial exception is inapplicable to Mr. Turner's claims and secular contract law should apply. This Court should follow the Kentucky Supreme Court, New Mexico Supreme Court, and North Carolina Court of Appeals and allow Mr. Turner's breach of contract claim to survive because it is unrelated to religious doctrine or practice and because Respondents ceded some of their constitutional protections. *Kirby,* 426 S.W.3d at 603.

B. This Court Should Reinstate Mr. Turner's Complaint Because the Ministerial Exception Does Not Apply to Retaliatory Discharge Claims Brought Under Section 740 of the Tourovia Labor Law.

While the First Amendment protects religious institutions in the United States, they are not their own independent city-states (*e.g.*, Vatican City in Italy) and they remain subject to secular laws. As with breach of contract claims, a court is not precluded from hearing a claim of retaliation merely because it involves a minister and a church. *See Galetti*, 331. P.3d at 1002–03. For instance, in *Galetti*, the New Mexico Supreme Court allowed a religious teacher's claim for retaliatory discharge, even after it acknowledged that the teacher was a "minister." *Id.* In addition, the Ninth Circuit in *Elvig v. Calvin Presbyterian Church*, allowed a minister's sexual harassment claim for retaliation because it was "purely secular." 375 F.3d 951, 959 (9th Cir. 2004). Here, an application of secular laws establishes that the ministerial

[2] While reviewing a 12(b)(6) motion to dismiss, this Court must assume the truth of the factual allegations, drawing all inferences in favor of the non-moving party. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 551 (2009).

exception does not preclude Mr. Turner's retaliatory discharge claim because (1) his claim is based on fraud and the ministerial exception does not protect fraud; and (2) Section 740 passes the three-pronged test set forth in *Lemon v. Kurtzman* to determine whether a statute fosters unconstitutional government entanglement with religious institutions.

1. The Ministerial Exception Does Not Preclude Mr. Turner's Fraud-Based Retaliation Claim.

The ministerial exception does not protect religious institutions from the consequences of committing fraud, and therefore, the ministerial exception does not apply to Mr. Turner's retaliation claims based on Respondents' fraudulent acts.

This Court established that a secular court may rule contrary to decisions made by church tribunals where fraud or collusion are implicated, even with regards to purely ecclesiastical matters. *Gonzalez v. Roman Cath. Archbishop*, 280 U.S. 1, 16 (1929); *see also Bell*, 126 F.3d at 330. Moreover, in *Hosanna-Tabor*, this Court noted that the ministerial exception does not apply to outward physical acts. 565 U.S. at 190 (citing *Emp't Div.*, 494 U.S. at 879). *Hosanna-Tabor* concerned "government interference with an internal church decision that affect[ed] the faith and mission of the church itself." *Id.* That internal church decision did not constitute an outward act affecting third parties. In juxtaposition, the Seventh Circuit, in *Listecki v. Official Comm. of Unsecured Creditors*, held that the ministerial exception did not preclude a group of creditors from asserting that the defendant Archdiocese declared bankruptcy after it fraudulently transferred $55 million from a general account to avoid paying its credits. 780 F.3d 731, 743 (7th Cir. 2015), cert. dismissed, 136 S.Ct. 581 (2015).

These cases provide authority for secular courts to determine issues involving a minister and a church when the claims involve fraud. While the Tourovia Court of Appeals did not review *claims* of fraud against Respondents, it reviewed claims of retaliation triggered by Respondents' fraud which should be adjudicated by a secular court. The Tourovia Labor Law sets forth a series of protective measures to ensure that employees who report unlawful conduct by their employers do not face retaliation. Tourovia Lab. Law § 740. Fraud surely falls within the ambit of this statute.

The facts set forth in Mr. Turner's complaint, taken as true, establish fraudulent behavior that affected third parties, thereby constituting "outward actions" subject to government regulation under *Employment Division* and *Hosanna-Tabor* and that is reviewable by a secular court notwithstanding the ministerial exception. The Trust provided that one half of the $1,500,000 was to be used to maintain the Church's cemetery. R. at 5. Mr. Turner was aware that the Church sold its cemetery in 2009. R. at 5. Nevertheless, Respondents urged Mr. Turner to place the half that was set aside for maintenance of the cemetery into Respondents' general operating account. R. at 5. Based on his extensive financial experience as a financial manager for IBM Corporation and as Treasurer and CFO of CCC, Mr. Turner reasonably concluded that his actions would constitute fraud, tax evasion, and breach of trust. R. at 5. Despite Mr. Turner's reasonable business judgment, Respondents insisted that he improperly allocate the full amount of the trust. R. at 5.

In this case, Respondents' fraudulent behavior triggers a violation of law, which in turn, triggers the Section 740 anti-retaliation statute. No church doctrine is involved. Even if the claim did implicate church doctrine, "it is unclear whether the intrachurch doctrine is even applicable where fraud is alleged." *Id.* at 742. This Court has explicitly stated that religion may sometimes be slightly inconvenienced so that the government can protect the public from injury. *Cantwell v. Conn.*, 310 U.S. 296, 306 (1940). This is such a case where any alleged inconvenience is outweighed by the importance of protecting the public. Respondents' actions affect the public good because Respondents attempted to defraud a financial institution and the IRS. Therefore, this Court should find that the ministerial exception does not apply to Mr. Turner's relational claim because Respondents' attempt to unlawfully claim one half of the Trust constituted outward, illegal action that the ministerial exception does not protect.

2. Tourovia's Anti-Retaliation Statute Does Not Facilitate Government Interference with Religion Because it Passes the *Lemon* Three-Pronged Test.

The ministerial exception does not apply to Section 740 of the Tourovia Labor Law because the statute survives the three-pronged test set forth by this Court in *Lemon v. Kurtzman* to determine whether a particular statute fosters unconstitutional government entanglement with religious institutions. 403 U.S. 602, 612–13 (1971). First, the statute must have a secular legislative purpose. *Id.* Here, the secular legislative purpose of Section 740 is to protect public health and safety. *See* Tourovia Lab. Law § 740(1)(A). For the Tourovia statute to apply, the particular

law, rule, or regulation that was violated must be of "the kind that creates a substantial and specific danger to public health or safety." *Id.*

Second, the statute's primary effect cannot advance nor inhibit religion. *Lemon*, 403 U.S. at 612–13. Section 740's primary effect is to protect whistleblowing employees from retaliation and it makes no reference to religion. Tourovia Lab. Law § 740. Further, this statute neutrally applies to "both public and private employees." *Id.* at § 740(2).

Third, the statute cannot prompt excessive governmental entanglement with religion. *Lemon*, 403 U.S. at 612–13. A retaliation action causes excessive entanglement only if it would impose some restraint on Respondents' "right to choose who will perform particular spiritual functions." *Petruska*, 462 F.3d at 305 n.8. Where a statute would not interfere with a church's chosen method of selecting its ministers, a balancing of interests should "strongly favor" application of that law. *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940, 948 (9th Cir. 1999). For instance, in *Bollard*, the Ninth Circuit allowed a minister's claim of sexual harassment because the church did not claim that harassment was a method of choosing its clergy. *Id.* at 947.

Just as the church in *Bollard* did not claim that its chosen method of selecting its ministers included sexual harassment, Respondents surely cannot assert that they choose pastors based on their willingness to acquiesce or look the other way from fraud and tax evasion. 196 F.3d at 947. Further, Tourovia law gives religious institutions an exception if the termination was actually for religious reasons: "It

shall be a defense for the employer that the personnel action was predicated upon grounds other than the employee's exercise of any rights protected by this section." Tourovia Lab. Law § 740(4). Given the statute's primary objective of protecting whistleblowers, its effect on a religious institution's hiring and firing of employees is incidental and minimal at worst.

Section 740 serves the secular, religion-neutral purpose of protecting the public from specific and substantial danger and avoids excessive government entanglement by excepting terminations effected for genuine religious reason. Since Section 740 passes the *Lemon* test, the ministerial exception does not preclude Mr. Turner's retaliation claim.

This Court should reverse the Tourovia Court of Appeals and reinstate Mr. Turner's retaliation claim because the ministerial exception does not protect Respondents' fraudulent, outward actions, and the application of Section 740 would not cause excessive entanglement.

II. THIS COURT SHOULD REVERSE THE TOUROVIA COURT OF APPEALS AND ALLOW DISCOVERY BECAUSE MR. TURNER'S COMPLAINT DOES NOT UNAMBIGUOUSLY ESTABLISH THAT THE MINISTERIAL EXCEPTION PRECLUDES HIS CLAIMS.

Alternatively, even if the ministerial exception is cognizable as an affirmative defense in breach of contract and retaliation actions, this Court should remand for discovery because Mr. Turner's complaint does not unambiguously establish that the exception precludes his suit. To survive a motion to dismiss under Tourovia Rule of Civil Procedure 12(b)(6), a complaint need only "contain sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face.'" *Ashcroft v.*

Iqbal, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2009)). The parties do not dispute that Mr. Turner's complaint contains sufficient facts to plausibly state claims for breach of contract and retaliatory discharge. Yet, the lower court erroneously dismissed Mr. Turner's claim based on the ministerial exception and denied Mr. Turner the opportunity to conduct discovery. R. at 7–11.

The ministerial exception is an affirmative defense, *Hosanna-Tabor*, 565 U.S. at 195 n.4, and so its "mere presence" does not render a claim for relief invalid. *Hyson USA, Inc. v. Hyson 2U, Ltd.*, 821 F.3d 935, 939 (7th Cir. 2016) (citations omitted). A Rule 12(b)(6) dismissal based solely on a potential defense such as the ministerial exception is only appropriate where a plaintiff alleges everything needed to satisfy the defense in his complaint. *Jones v. Bock*, 549 U.S. 199, 215 (2007). Put another way, dismissal is improper unless "the factual allegations in the complaint *unambiguously* establish all the elements of the defense." *Hyson*, 821 F.3d at 939 (emphasis added) (internal citations and quotations omitted).

Mr. Turner's complaint does not unambiguously indicate that the ministerial exception precludes his claims, and this Court should accordingly remand for discovery to determine the viability of the ministerial exception as an affirmative defense. At this early stage in litigation, Mr. Turner need only show that "*some* form of inquiry" into his claims and "*some* form of remedy" would be possible without violating church autonomy. *Minker*, 894 F.2d at 1360 (emphasis in original); *see Puri v. Khalsa*, 844 F.3d 1152, 1158 (9th Cir. 2017). Based solely on the allegations in the

Mr. Turner's complaint, a court could inquire further into and potentially resolve his claims without such violation.

A. This Court Should Hold that the Ministerial Exception Only Precludes Discovery if Mr. Turner's Complaint Unambiguously Establishes that His Claims Cannot be Resolved Without Violating Church Autonomy

This Court should reverse the Tourovia Court of Appeals and remand Mr. Turner's claims for discovery because the ministerial exception does not bar litigation simply because a "minister" brings suit against a "church." *Rweyemamu v. Cote*, 520 F.3d 198, 207 (2d Cir. 2008) (citing *Bollard*, 196 F.3d at 950). Not every court inquiry into a minister's termination creates unconstitutional state interference with a church. *Rojas v. Roman Cath. Diocese of Rochester*, 557 F. Supp. 2d 387, 399 (W.D.N.Y. 2008) (citing *Rweyemamu*, 520 F.3d at 209); *Kirby*, 426 S.W.3d at 615; *Galleti*, 331 P.3d at 1001. The Constitution forbids such employment claims from proceeding to discovery only where their resolution would inevitably violate church autonomy for one of two reasons. Either (1) the *specific issues* the court must resolve involve a church's "discipline, faith, internal organization, or ecclesiastical rule, custom or law," *Bell*, 126 F.3d at 331 (quoting *Milivojevich*, 426 U.S. at 713); or (2) the plaintiff's requested remedy would "interfere[ ] with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs," *Hosanna-Tabor*, 565 U.S. at 188.

The First Amendment does not bar discovery in cases that involve a limited, purely secular inquiry where a trial court could use its case management authority to "prevent a wide-ranging intrusion into sensitive religious matters." *Rweyemamu*, 520 F.3d at 207 (citing *Bollard*, 196 F.3d at 950); *see Bell*, 126 F.3d at 331. In such

cases, a secular court may apply neutral principles of law to resolve a suit even if the court's ultimate ruling could contravene the decision of a church's hierarchy. *Maktab Tarighe Oveyssi Shah Maghsoudi, Inc. v. Kianfar*, 179 F.3d 1244, 1249 (9th Cir. 1999) (citing *Jones v. Wolf*, 443 U.S. 595, 604–06 (1979)). Numerous lower courts have applied the "neutral-principles approach" to claims involving ministerial employees, including claims for breach of contract, retaliation, fraud, and conspiracy. *See Puri*, 844 F.3d at 1166–67; *Kirby*, 426 S.W.3d at 619; *Galetti*, 331 P.3d at 1001–03; *McKelvey v. Pierce*, 800 A.2d 840, 856–57 (N.J. 2002). As this Court noted in *Jones v. Wolf*, the neutral-principles approach has the benefit of being "completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity." 443 U.S. at 603. By "relying exclusively on objective, well-established concepts," it "promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice." *Id.* Because of these inherent advantages, this Court should now extend *Jones v. Wolf* and the neutral-principles approach to claims brought by ministerial employees.

The trend of allowing ministers to conduct discovery into purely secular claims against their church-employers fully comports with this Court's decision in *Hosanna-Tabor*. 565 U.S. 173. This Court decided *Hosanna-Tabor* on summary judgment after the development of a full record showed that resolution of the plaintiff's discrimination claims would intrude into ecclesiastical matters. *Id.* at 180. Moreover, Discrimination laws present a special case warranting special treatment in that they necessarily interfere with church governance by imposing hiring and

firing standards that "depriv[e] the church of control over the selection of those who will personify its beliefs." *Id.* at 188. Whenever a discrimination law is implicated, a finding of per se interference with church autonomy, and thus a complete bar on discovery, is justified. *See Kirby*, 426 S.W.3d at 614–15.

On the contrary, and as is the case here, laws with incidental effects on employment serve different and more nuanced policies outside the realm of church autonomy and should not automatically preclude discovery. Contract law exists to enforce bargained-for-exchanges and terms freely agreed to by two parties. *See Am. Airlines v. Wolens*, 513 U.S. 219, 233 (1995). Whistleblower statutes discourage employers from committing unlawful acts that harm third parties outside the employment relationship and prevent retaliation against an employee that acts to protect or warn those third parties. *See* Whistleblower Protection Act of 1989 § 2, Pub. L. No. 101–12, 103 Stat. 16 (1989). Unlike discrimination suits, claims brought under these laws do not inherently involve governmental control over a church's personnel. Therefore, to determine whether a claim may proceed to discovery, courts should "look not at the label placed on the action but at the actual issues the court has been asked to decide" to examine whether the resolution of the claim would inevitably violate church autonomy. *Kirby*, 426 S.W.3d at 619 (citing *Prioleau*, 49 A.3d at 816); *see Galetti*, 331 P.3d at 1002–03.

The approach of a recent Kentucky Supreme Court decision exemplifies this distinction. *Kirby*, 426 S.W.3d 597. The *Kirby* court summarily dismissed a minister's wrongful termination claim under discrimination law with little

discussion, but undertook an extensive analysis of his contract claim arising from the same facts. *Id.* at 614–21. Several pre-*Hosanna-Tabor* decisions followed similar approaches. *See, e.g.*, *Petruska*, 462 F.3d 294; *Minker*, 894 F.2d 1354.

One notable detractor is the Wisconsin Supreme Court, which erroneously interpreted *Hosanna-Tabor* in a manner that could be read to prevent discovery concerning *all* claims brought by a ministerial employee for any reason related to his termination.[3] *See DeBruin*, 816 N.W.2d at 889. Such a broad interpretation is wholly untenable and perverts the policies underlying the First Amendment. As the New Jersey Supreme Court noted, this approach would allow churches to categorically ignore all tort and contract obligations owed to ministerial employees and would thus "create an *exception* for, and may thereby help *promote*, religion." *McKelvey*, 800 A.2d at 857 (citation omitted) (emphasis in original).

In order to avoid creating such an exception, and consistent with Supreme Court precedent in *Hosanna-Tabor*, this Court should hold that the ministerial exception does not preclude discovery into Mr. Turner's claims unless his complaint unambiguously establishes that that the resolution of his claims would violate church autonomy.

[3] The *DeBruin* court denied discovery into whether a church had "good and sufficient cause, as determined by the [church]" to terminate a minister. 816 N.W.2d at 883, 889. This result would be identical under the neutral-principles standard—a court inquiry into what constituted "good and sufficient cause" under the contract would necessarily require an inquiry into religious doctrine and governance to determine the church's definition of "cause." *Id.* at 889.

B. This Court Should Remand for Discovery Because Mr. Turner's Claims for Breach of Contract and Retaliation Can Be Explored Without Violating Church Autonomy.

This Court should remand for discovery because a trial court could resolve the parties' employment dispute without violating church autonomy, and indeed discovery would shed light on Mr. Turner's claims without intrusion into Respondent's religious practices. In *McKelvey*, the New Jersey Supreme Court developed a test for determining whether the resolution of a suit would violate church autonomy, and therefore prevent the parties from conducting discovery. 800 A.2d at 856. First, a court should "analyze each element of every claim and determine whether adjudication would require the court to choose between 'competing religious visions,' or cause interference with a church's administrative prerogatives." *Id.* Second, a court should "examine the remedies sought by the plaintiff and decide whether enforcement of a judgment would require excessive procedural or substantive interference with church operations." *Id.* If the answer to both of these inquiries is no, a court may resolve the suit using neutral-principles, even if the dispute "theoretically [or] tangentially touch[es] upon religion" and "even when the dispute arises from . . . a relationship between a church and a ministerial-type plaintiff." *Id.* Some variety of this test has been adopted by virtually every court that employs the neutral-principles approach. *See, e.g.*, *Petruska*, 462 F.3d at 307–10; *Connor v. Archdiocese of Phila.*, 975 A.2d 1084, 1103 (Pa. 2009); *Roman Cath. Diocese of Jackson v. Morrison*, 905 So.2d 1213, 1241–42 (Miss. 2005). This Court should adopt the *McKelvey* test because it provides the most effective means of allowing

ministerial employees to enforce their secular rights while still guarding against the possibility of religious entanglement by the courts.

The resolution of Mr. Turner's claim will not inevitably violate church autonomy, and thus the parties must conduct discovery to determine the viability of the ministerial exception. Applying the *McKelvey* test to the face of Mr. Turner's complaint establishes the necessity of discovery in this case. The first prong of the test requires an element-by-element analysis of each of Mr. Turner's claims. To plead an action for breach of contract, a party must allege "(1) a valid contract between the parties, (2) a . . . duty arising out of the contract, (3) a breach of that duty, and (4) damages caused by the breach." *Gillis v. Principia Corp.*, 832 F.3d 865, 871 (8th Cir. 2016). Where a contract allows for discretion in choosing when to terminate a minister, courts have denied discovery and held that dismissal is appropriate. *See DeBruin*, 816 N.W.2d at 889; *see also Minker*, 894 F.2d at 1360. For instance, the Wisconsin Supreme Court held that an inquiry into whether a church had "good and sufficient cause" to terminate its pastor would infringe on the church's right to be "the sole decision-maker about who will preach its beliefs." *DeBruin* 816 N.W.2d at 889.

However, in assessing employment contracts such as Mr. Turner's, where the alleged terms are unambiguous and leave no room for interpretation by religious authorities, courts have uniformly permitted discovery to determine whether the contact's terms were breached or any additional terms existed. For example, although the D.C. Circuit in *Minker* would not permit inquiry into the *reason* a church denied its pastor a new congregation pursuant to an oral promise, it remanded for

discovery to determine whether such congregations became available, but were not offered to him. 894 F.2d at 1360. Likewise, the New Mexico Court of Appeals allowed discovery into whether a church breached a minister's contract by failing to provide timely notice of termination. *Galetti*, 331 P.3d at 1001.

Mr. Turner should be permitted to proceed to discovery on his breach of contract claim because the facts alleged in his complaint, accepted as true, establish that (1) Respondents employed him pursuant to a yearly employment contract, R. at 4; (2) Respondents terminated his employment before his contract had expired, R. at 4; and (3) he suffered monetary damages as a result, R. at 5. *See Gillis*, 832 F.3d at 871. Unlike the "for cause" provision contained in the pastor's contract in *DeBruin*, nothing in the record indicates Respondents retained any discretion to terminate Mr. Turner prior to the expiration of his contract. 816 N.W.2d at 883. If Respondent argues as much, then the need for discovery is evident. Because the existence and substance of such contractual terms can be determined using neutral principles of law, and without any inquiry whatsoever into church doctrine, the first prong of the *McKelvey* test is satisfied as to Mr. Turner's breach-of-contract claim.

Mr. Turner's claim for retaliatory discharge may likewise be resolved without "interference with [Respondents'] administrative prerogatives." *McKelvey*, 800 A.2d at 856. Based on the allegations in the record, the ultimate fact-finder must decide whether: (1) Mr. Turner reported Respondents' alleged tax evasion and fraud to the IRS or Wells Fargo, R. at 5; (2) Mr. Turner first notified Respondents of the allegations and allowed them time to cure, R. at 5; (3) Respondents in fact committed

tax evasion or fraud; (4) Respondents' unlawful conduct created a danger to public health or safety; and (5) Mr. Turner was terminated, R. at 4. *See* Tourovia Lab. Law § 740(1), (3). The first two elements, concerning Mr. Turner's reports, address whether or not Mr. Turner performed specific, non-religious acts. Thus, their resolution would not "require the court to choose between competing religious visions." *McKelvey*, 800 A.2d at 856. The second two elements, concerning Respondents' misconduct, are "quintessentially susceptible to decision by neutral principles" of tax law, tort law, and statutory construction. *See Puri*, 844 F.3d at 1167. The final element is undisputed: Respondents terminated Mr. Turner on October 31, 2012. R. at 4.

Section 740 also creates a defense that allows an employer to avoid liability by proving that it terminated an employee for a reason "other than the employee's exercise of any rights protected by [Section 740]." Tourovia Lab. Law § 740(4). As Mr. Turner does not have the burden to *disprove* this defense, it should not even be considered at the 12(b)(6) stage. *See Hyson*, 821 F.3d at 939. Regardless, the Complaint does not unambiguously indicate that resolving this defense would violate church autonomy. Although *Hosanna-Tabor* precluded inquiry into whether a church's stated reasons for terminating a minister were pretextual, this holding was limited to discrimination suits where a church would presumably be immune from liability *even if it admitted* that a stated reason was pretextual. 565 U.S. at 194–95; *see Kirby*, 426 S.W.3d at 614–15. In other contexts, there is a split in authority as to the scope of permissible discovery.

Some courts have categorically prohibited any inquiry into the reasons behind a minister's termination. *See, e.g.*, *Tomic v. Cath. Diocese of Peoria*, 442 F.3d 1036, 1038 (7th Cir. 2006). However, this approach runs afoul of the First Amendment as much as a blanket ban on ministerial suits. A standard that would allow Respondents to avoid its secular employment obligations merely by claiming "religious reasons" with no further explanation would promote religion by granting "an advantage that no secular employer enjoys." *McKelvey*, 800 A.2d at 857 (citation omitted).

Instead, this Court should adopt the position of the Second Circuit and permit discovery for the limited purpose of determining whether Mr. Turner's termination involved *any* issue of religion. *See Rojas*, 557 F. Supp. 2d at 399 (citing *Rweyemanu*, 520 F.3d at 209). This approach is particularly appropriate where, as here, the inquiry may turn on the truthfulness of a single statement. For instance, in *Pretruska*, the Third Circuit allowed discovery into a chaplain's claim of fraud in connection with her termination dependent "upon the truth or falsity of the assurances that she would be evaluated on her merits." 462 F.3d at 310. As pled, Mr. Turner's retaliation claim may similarly turn on the veracity of Dr. Jones's single statement that Respondents had "lost faith" in Mr. Turner's leadership. R. at 4. Importantly, Mr. Turner is not challenging his *qualifications* as a pastor, an inquiry which would certainly violate church autonomy, but merely whether the church in fact fired him for religious reasons, as opposed to in retaliation for his exercise of the rights afforded to him under Section 740. Thus, discovery into the validity and truth

of Dr. Jones' statement would not interfere with church administration, and Mr. Turner's retaliation claim should survive the first prong of the *McKelvey* test.

Finally, as to the second prong of the *McKelvey* test, the enforcement of Mr. Turner's requested judgment for monetary compensation would require neither procedural nor substantive "interference with church operations." 800 A.2d at 856. As opposed to an order demanding reinstatement, which would require post-judgment surveillance by the court and undoubtedly constitute impermissible procedural interference, no such concerns exist with retrospective money damages. *Kirby*, 426 S.W.3d at 620. Moreover, although a penalty for a church's failure to comply with an otherwise unconstitutional discrimination statute would be substantively improper, *Hosanna-Tabor*, 565 U.S. at 194, no similar "distortion of church appointment decisions" would result here from merely requiring that Respondents "not make empty, misleading promises to its clergy," *Minker*, 894 F.2d at 1360, or enforcing an outward law of general applicability such as Section 740, *Emp't Div.*, 494 U.S. at 879.

The ministerial exception does not preclude discovery in this case because neither the resolution of Mr. Turner's claims nor the enforcement of his requested remedy would inevitably violate church autonomy. *McKelvey*, 800 A.2d at 856. This Court should therefore reverse the Tourovia Court of Appeals and allow the parties to explore Mr. Turner's claims while the trial court exercises its broad case management authority to prevent intrusion into sensitive religious matters. *Rweyemanu*, 520 F.3d at 331.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Tourovia Court of Appeals and hold that the ministerial exception does not apply to Mr. Turner's claims, or alternatively, that the parties must conduct additional discovery before the trial court can make that determination.

Respectfully submitted,

Dated: March 10, 2017

By: /s/ Team No. 18

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